No. 17-773

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

"Fees for [the] representation of individuals claiming Social Security old-age, survivor, or disability benefits [at] the administrative and judicial review stages [are handled] discretely: [42 U.S.C.] § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002). Section 406(b) specifies in particular that

> [w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee *for such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A) (emphasis added).

The question presented is:

Whether fees subject to § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to Richard A. Culbertson and the then-Commissioner of Social Security, Celalettin Akarcay, Darleen R. Schuster, Bill J. Westfall, and Katrina F. Wood were parties in the consolidated proceeding in the court of appeals. Among the non-governmental parties, Richard A. Culbertson is the real party in interest. Pet. App. 3a, n.1. Since the case concerns fee awards related to the representation of only Katrina F. Wood, petitioner believes that Celalettin Akarcay, Darleen R. Schuster, and Bill J. Westfall, have no interest in the case's outcome. See Rule 12.6.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The district court's order of April 20, 2016 on Plaintiff's Amended Consent Motion For Attorney's Fees (Pet. App. 18a-29a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari until November 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent parts of the relevant statutory provisions, 42 U.S.C. § 406(a)-(b), appear in the appendix to the petition for a writ of certiorari. Pet. App. 58a-64a.

STATEMENT

A. Statutory Background

Title II of the Social Security Act, 42 U.S.C. § 401 et seq., governs the award and collection of fees by attorneys representing claimants seeking old-age, survivor, or disability insurance benefits. Section 406(a) governs the award and collection of attorney's fees for representing Social Security claimants before the agency. Section 406(b), by contrast, governs the award and collection of fees by attorneys for representing claimants in court.

Section 406(a) provides two ways for an attorney to obtain fees for work before the agency: the "fee petition process" and the "fee agreement process." The "fee petition process" is governed by § 406(a)(1). When the agency acts favorably to the claimant, § 406(a)(1) authorizes the Administration to "fix * * * a reasonable fee to compensate [the] attorney for the services performed by him in connection with such claim." 42 U.S.C. § 406(a)(1). Section 406(a)(1) requires that any such award be "reasonable" but does not otherwise limit it. *Ibid.* And the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2).

The "fee agreement process" is governed by § 406(a)(2). Under it, the attorney and the claimant enter into a written fee agreement and submit it to the agency before it determines the claimant's benefits. 42 U.S.C. § 406(a)(2)(A). If the agency acts favorably to the claimant, it "shall approve" the fee agreement at the time of the determination, provided the fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. *Id.* § 406(a)(2)(A)(iii); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). The claimant or the agency adjudicator can request agency review of the fees if either believes the agreed-upon amount is excessive under the particular circumstances of the case. *Id.* § 406(a)(3)(A)(i).

Section 406(b), by contrast, governs the fees an attorney may charge a claimant for representation *in court*. It states that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). The particular question concerns whether § 406(b)'s allowance of "reasonable fee[s] for *such representation*," *ibid.* (emphasis added), includes representation before the agency or only before the court.

B. Procedural Background

1. In 2008, Katrina F. Wood, represented by Richard A. Culbertson, filed for Social Security disability benefits but was determined by the Administrative Law Judge (ALJ) not to be disabled. Pet. App. 28a. After the Appeals Council denied review, Wood sought review in the district court, which reversed and remanded the agency's decision. *Ibid.* The court also awarded Wood $4,107.27 in attorney's fees under the Equal Access to Justice Act (EAJA).[1]

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[1] The EAJA separately "requires the government to pay the fees and expenses of a 'prevailing party' [in a civil proceeding] unless the government's position was 'substantially justified.'" *Parrish* v. *Commissioner of Soc. Sec. Admin.*, 698 F.3d 1215, 1218 (9th Cir. 2012) (quoting 28 U.S.C. § 2412(d)(1)(A)). As compared to awards under § 406(a)(2) and § 406(b) of the Social Security Act (SSA), EAJA awards are not determined as a percentage of the amount recovered, but rather are based on the "time expended" and the attorney's hourly rate. *Ibid.* (quoting *Gisbrecht* v.

Pet. App. 22a. At that point, Wood and Culbertson entered into a fee agreement providing for attorney's fees for future work in the amount of 25 percent of any past-due benefits minus attorney's fees paid under the EAJA. Pet. App. 19a, 22a. On reconsideration, the agency awarded Wood past-due benefits of $35,211 for herself and a child beneficiary, Pet. App. 4a, 27a, and, pursuant to § 406(a), awarded Culbertson $2,865 in attorney's fees for representing her before the agency, Pet. App. 5a, 22a, which would come out of her awarded past-due benefits, *ibid.*

Wood then asked the district court to authorize a payment of $4,488.48 in attorney's fees to Culbertson under § 406(b) for his work reversing the agency's initial decision in court. Pet. App. 19a. The request followed the terms of the fee agreement and represented 25 percent of the past-due benefits that Wood had collected ($8,595.75) minus the fees already awarded under the EAJA ($4,107.27). Pet. App. 22a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see Pet. App. 20a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing

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Barnhart, 535 U.S. 789, 796 (2002)). In 1985, Congress amended the EAJA to allow attorneys to receive fees under both § 406(b) of the SSA and § 2412 of the EAJA. *Ibid.* If both awards are for the "same work," *ibid.*, however, the attorney must "refun[d] to the claimant the amount of the smaller fee," *Gisbrecht*, 535 U.S. at 796 (quoting Pub. L. 99-80, § 3, 99 Stat. 186 (1985)) (alteration in original). This "effectively increases the portion of past-due benefits the successful Social Security claimant may pocket." *Ibid.* The lawyer gets nothing extra.

Paltan v. *Commissioner of Soc. Sec.*, 518 F. Appx. 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Soc. Sec.*, 490 F. Appx. 314 (11th Cir. 2012) as persuasive authority), the district court held, however, that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), Pet. App. 26a. It thus declined to award Culbertson for his work in court 25 percent of the past-due benefits minus the EAJA award, as the fee agreement provided. *Ibid.* The district court instead awarded only $1,623.48, which represented 25 percent of the past-due benefits minus *both* the EAJA award and the § 406(a) fees awarded by the Commissioner. *Ibid.*

2. On appeal, the Eleventh Circuit affirmed the district court's order. Pet. App. 17a. It first rejected the claimant's argument that *Dawson*, the controlling Fifth Circuit precedent adopted by the Eleventh Circuit, see Pet. App. 11a, limited only the amount the agency could itself *pay out* from past-due benefits, not the amount the district court could *authorize* for payment, Pet. App. 13a. Next, it acknowledged that three other circuits "do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406." *Ibid.* Although that was "[t]rue," the court argued (1) that all those cases "explicitly or implicitly recognize that Dawson limited the combined § 406(a) and (b) attorney's fees awards to 25% of past-due benefits," *ibid.*, (2) that "[t]he Fifth Circuit continues to read Dawson to limit the aggregate award," Pet. App. 14a n.5 (citations omitted), and (3) that "the Fourth Circuit [has] relied on Dawson to support its holding that

§ 406(b) limits the combined § 406 fee award to 25% of past-due benefits," *ibid.* "To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided," the court noted, "this does not empower us to ignore it." Pet. App. 14a. "We are," it continued, "bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

The Eleventh Circuit incorrectly applied § 406(b)'s 25-percent cap to limit the aggregate award of attorney's fees without regard to whether those fees were authorized under § 406(a) for representation before the agency or § 406(b) for representation before the court. Pet. App. 12a-14a. This approach contravenes the plain meaning of the statute by misunderstanding the antecedent of the phrase "such representation"; ignores the fact that the structure of the statute treats the award mechanisms in § 406(a) and § 406(b) as independent and distinct; undermines the congressional purpose of encouraging effective legal representation of claimants; misconstrues the practical effect of allowing independent awards of attorney's fees under both § 406(a) and § 406(b); and misinterprets § 406(b)'s legislative history as applying to representation before the agency.

I. If "the statutory text is plain and unambiguous," the court "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). The language of § 406(b) is plain. When a court "renders a judgment favorable to a

claimant * * * who was represented before the court by an attorney," the court may award "a reasonable fee for such representation" that is limited to 25 percent of the claimant's past-due benefits. 42 U.S.C. § 406(b)(1)(A). The antecedent of "such representation" is representation "before the court by an attorney." *Ibid.* Indeed, representation "before the court" is the only type of representation mentioned in § 406(b). Whereas § 406(a)(1) explicitly references representation "before the Commissioner for benefits," § 406(b) contains no such language. As a result, § 406(b)'s 25-percent cap on attorney's fees cannot be read to apply to representation before an agency without violating the plain text of the statute.

II. When the language of the statute is plain, the Court need not look beyond it. Even so, if the Court were to look beyond the plain language of the statute, the structure of § 406 confirms what the plain language makes clear—that the award mechanisms in § 406(a) and § 406(b) function independently and distinctly. Section 406(a) governs the award of fees for attorneys appearing "before the Commissioner" and provides two possible methods for determining a "reasonable" fee. 42 U.S.C. § 406(a). If the fee is based on a prior fee agreement between the attorney and the claimant, the statute deems it reasonable only if it falls below the lesser of a 25-percent cap or $6,000. *Id.* § 406(a)(2)(A); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). In comparison, if the fee is determined by the agency, where there is arguably less potential for excessive fees, the fee is subject only to a general reasonableness

limitation. *Id.* § 406(a)(1). If it deems such a fee reasonable, the agency is free to award attorney's fees that exceed 25 percent of the claimant's past-due benefits.

Section 406(b), on the other hand, addresses proceedings before the district court. Because Congress was similarly concerned that claimant's attorneys would submit requests for excessive fees, it applied a separate 25-percent cap on awards of attorney's fees for representation "before the court." 42 U.S.C. 406(b)(1)(A).

In light of this structure, applying § 406(b)'s 25-percent cap to an agency's award of attorney's fees under § 406(a) would lead to illogical and incongruous results. If the agency's award were governed by § 406(a)(2), the application of § 406(b)'s 25-percent cap would be unnecessarily duplicative. Attorney's fees awarded by an agency would be subject to a 25-percent cap twice—a useless form of double counting. Even more absurdly, reading § 406(b) to include § 406(a)(1) fees under its own 25-percent cap would require the court to declare fees exceeding 25 percent of past-due benefits, which § 406(a)(1) authorizes when "reasonable," effectively unreasonable under § 406(b).

III. In drafting § 406, Congress sought to accomplish two interrelated purposes: namely, to "encourage effective legal representation of claimants" and to limit "inordinately large [representation] fees." *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965) (*Hearings*) (supplemental report submitted by the Dep't of Health, Educ., & Welfare). Applying § 406(b)'s 25-percent cap only to work done before the

district court promotes the former purpose in a manner that is consistent with the latter.

The social security system is a complex regulatory scheme and pro se claimants are significantly less likely to win a favorable ruling. Representation by social security attorneys in proceedings before both the agency and the court is often necessary to vindicate the rights of claimants. It is not uncommon, however, for a plaintiff to have different representation before the agency, where representation by a non-attorney is permitted, than before the court. As a result, if § 406(b)'s 25-percent cap were interpreted to include fees for representation before the agency, the representative before the agency could effectively "use up" the cap, leaving no fees for the attorney who represented the claimant before the court and discouraging attorneys from ever taking on such cases. Even if the same attorney agreed to represent a claimant before the agency and before the court, applying § 406(b)'s cap to both proceedings would undermine the claimant's quality of representation: the additional costs of going to court would not be offset by additional fees, discouraging attorneys from seeking judicial review of an adverse agency holding. Separate treatment of attorney's fees under § 406(a) and § 406(b) is thus necessary to encourage effective representation of claimants through all stages of the proceedings.

Such encouragement does not come at the expense of claimants. Allowing an attorney to receive separate compensation for representation rendered before both the agency and the court does not pose a significant

risk of excessive fees that substantially detract from the value of the plaintiff's benefits. Attorney's fees under § 406(b) are calculated only in terms of the claimant's past-due benefits. Social security beneficiaries, however, may receive a wide range of additional forward-looking benefits. Thus, allowing an attorney to recover additional reasonable compensation under § 406(b) will not risk diverting a significant portion of the claimant's total financial award to the attorney.

IV. While the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (citing *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436 (2016)), proper consideration of the legislative history supports the holding that § 406(b)'s 25-percent cap does not apply to fees awarded for representation before the agency. In hearings before the Senate Committee on Finance, the Department of Health, Education, and Welfare expressed concern over "inordinately large fees for representing claimants *in Federal district court actions*." *Hearings* 513 (supplemental report submitted by the Dep't of Health, Educ., & Welfare) (emphasis added). The legislative history of § 406(b) expresses no concern over fees awarded for representation before the agency under § 406(a).

ARGUMENT

I. The Plain Language Of Section 406(b) Makes Clear That A Court Should Not Consider Fees Awarded Under Section 406(a) As Subject To Section 406(b)'s 25-Percent Cap

This Court has long held that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) (citations omitted).

The language of 42 U.S.C. § 406(b) is plain. In relevant part, the statute provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A).

Section 406(b) begins by defining *when* a judge may award attorney's fees: "[w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney." 42 U.S.C. § 406(b)(1)(A). It then specifies *how much* the attorney may receive—"a reasonable fee * * * not in excess of 25 percent of the total of the past due benefits to which the claimant is entitled by reason of such

judgment," *ibid.*—and *for what* matters the attorney may bill: "for such representation," *ibid.* The adjective "such" is "used to avoid repetition" and it means "of the sort or degree previously indicated." Webster's Third New International Dictionary 2283 (1976). "[S]uch representation," then, can refer only to representation "before the court"—the only type of representation mentioned in § 406(b). In no way can it include fees for representation before the agency. Reading in a limitation of 25 percent on the total fees awarded under both § 406(a) and § 406(b) therefore violates the "cardinal canon" of construction that a court is to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted).

Unlike § 406(b), § 406(a) does refer to fees provided for representation "before the Commissioner for benefits." 42 U.S.C. § 406(a)(1). Reading an aggregate limitation into § 406(b) therefore also runs counter to the principle of *expressio unius est exclusio alterius*, the notion that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Because Congress used the "particular language" of "before the court" in regard to fees awarded under subsection (b) and did not include the "particular language" of "before the Commissioner," it cannot have intended for § 406(b)'s cap to extend to awards under § 406(a).

Congress knows, moreover, how to set aggregate fee caps. Section 406(a) provides that if a claimant prevails on both an old-age, survivors and disability insurance claim under Title II and a separate supplemental security income claim under Title XVI the agency may approve the fee agreement only if "the total fee or fees specified in such agreement do[] not exceed, in the aggregate," $6,000. 42 U.S.C. 406(a)(2)(C). Had Congress wanted § 406(b) to similarly cap aggregate fees, it would have used similar language. But it did not.

Likewise, Congress knows how to provide fee offsets and its failure to expressly do so here indicates that fees awarded under § 406(a) are not intended to offset fees awarded under § 406(b). Congress, for example, expressly provided that EAJA fees offset § 406(b) fees. Pub.L. 99-80, § 3, 99 Stat. 186 (1985). But, tellingly, it has not similarly provided for any offset of § 406(a) fees against § 406(b) fees.

When the words of a statute are unambiguous, as they are in § 406(b), the "judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court thus need not consult either the statutory structure, the congressional purpose, or the legislative history, but, in fact, all three point in the same direction as the plain language.

II. Section 406's Structure Creates Distinct Avenues For Awarding Fees For Administrative And Judicial Representation

The statutory structure confirms what the plain language makes clear—Congress created two distinct and independent award mechanisms in § 406(a) and § 406(b). Section 406(a) itself provides two ways for an attorney to seek fees for representing a claimant in administrative proceedings: the fee-petition process and the fee-agreement process. Under the former, the agency authorizes a "reasonable fee" to be paid to the claimant's representative.[2] 42 U.S.C. § 406(a)(1). Under the latter, any fee set by agreement between the attorney and the claimant presumptively controls so long as it does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). The claimant or the agency adjudicator can, however, request agency review of the fees if either believes the agreed-upon amount is excessive under the particular circumstances of the case. *Id.* § 406(a)(3)(A)(i).

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[2] The agency has given this reasonableness inquiry real teeth. In determining whether a fee request is reasonable, it must consider "[t]he extent and type of services the representative performed"; "[t]he complexity of the case"; "[t]he level of skill and competence required of the representative"; "[t]he amount of time the representative spent on the case"; "the results the representative achieved"; and "the amount of fee the representative requests." 20 C.F.R. § 404.1725(b)(1). The agency also allows both the claimant and the attorney to seek administrative review of fees authorized under the petition process. *Id.* § 404.1720(d).

Section 406(b), on the other hand, governs awards for attorneys representing claimants before a court. 42 U.S.C. § 406(b). Given that § 406(a) sets forth two separate avenues for determining attorney's fees for representation before the agency, it would not make sense to interpret § 406(b) to regulate awards for representation there. There is simply no need for § 406(b) to regulate awards already deemed "reasonable" under § 406(a) either by the agency itself or by Congress's safe harbor. Section 406(a)'s two attorney's fee provisions effectively check excessive fees for representation before the agency. Checking them again under a provision designed to check fees for representation in court represents an insidious form of double counting.

As the Ninth Circuit has pointed out, moreover, the statute does not cap the reasonable fees the agency can award through the petition process. *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008). Because § 406(a)(1) authorizes the agency to award reasonable fees above 25 percent of past-due benefits, it makes no sense for § 406(b) to include such fees under its own 25-percent cap. In many cases, that would mean that fees authorized as "reasonable" under § 406(a)(1) would be effectively unreasonable under § 406(b).

Congress structured the statute to separate fee determinations by forum for a reason: claimants may use different representatives before the agency and the courts. Even a non-lawyer, for example, can represent—and receive fees for representing—a claimant before the agency. See Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017,

Informational Report: Agency Payments to Claimant Representatives 1 (2015), https://tinyurl.com/y97wvypq ("A claimant may appoint a qualified individual to act on his/her behalf in matters before the Social Security Administration."). Only attorneys, by contrast, can represent claimants in court and be awarded fees for doing so. Soc. Sec. Admin., *Program Operations Manual System* GN 03920.017 § D.5 n.2, https://tinyurl.com/yahfryzb ("In court cases, the law does not provide for direct payment to a non-attorney."). The Social Security Administration (SSA) recognizes that representation may change between agency and court proceedings. See *id.* GN 03920.060 § A.5, https://tinyurl.com/yd53d2la ("The attorney(s) for the court proceedings may differ from the representative(s) for the SSA administrative proceedings."). Even when representation does not change, however, it would be nonsensical for a representative to accept the same fee when benefits are obtained on the first try in agency proceedings as compared to when they are obtained after an agency denial, a trip to the federal courts, and a return back to the agency.

That the structure of § 406 provides separate fee caps for administrative and court proceedings is clear from the face of the statute. Any suggestion otherwise, moreover, is further rebutted by SSA's Program Operations Manual System (POMS). POMS contains administrative interpretations that "warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift." *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385

(2003). Here, POMS closes the door on any suggestion that administrative and court representation fees share a single fee cap.

POMS instructs administrators to withhold only 25 percent of a claimant's past-due benefits for payment of both § 406(a) and (b) representation fees—and it anticipates situations in which the combined fee total will surpass that 25 percent. Soc. Sec. Admin., *Program Operations Manual System*, GN 03920.050 § C, https://tinyurl.com/yak75mr8. "In a dual fee situation (i.e., authorization of both administrative and court-awarded fees), although the court fee and the administrative fee combined may exceed 25 percent of the [past-due benefits]," SSA will "only pay up to 25 percent, as required by law." *Ibid.* Representatives "must look to the claimant for payment of the portion" that exceeds the 25-percent withholding cap. *Id.* § D.1, https://tinyurl.com/yak75mr8.

It is both consistent with and expected by the statute that situations arise in which total representation fees exceed 25 percent of past-due benefits. The fee authorization system is thus not designed to limit total fee awards to 25 percent of past-due benefits. Fees claimed before a federal court "are not subject to authorization by SSA." Soc. Sec. Admin., *Program Operations Manual System*, GN 03910.001, https://tinyurl.com/y9u7wdfp. The "court's authorization is for services before the court only, while SSA's authorization is for services before SSA only." *Id.* GN 03920.060 § A.4, https://tinyurl.com/yd53d2la. Fees authorized by either SSA or courts are submitted to

SSA for processing and direct payment. *Id.* GN 03920.050 § D.1. If dual fees are submitted, SSA does not take steps to reduce the total fees to less than 25 percent of past-due benefits. It simply pays out the fees in the order authorization is received until the withheld 25 percent of past-due benefits runs out. *Id.* § D.4. Representatives are not barred from collecting additional fees at this point—but they must turn to the claimant to collect them. *Id.* § D.1. If dual fee authorizations are received at the same time, SSA will prorate the fees to fit within the withholding cap, and, again, representatives can collect the remainder from claimants. *Id.* §§ D.1, D.4.

III. Applying A Cap Of 25 Percent Under Section 406(b) For Work Done Before Both The Agency And The Courts Undermines Congress's Purpose

Because the words of § 406(b) are unambiguous, this Court need not consider Congress's purpose in enacting it. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous * * * judicial inquiry is complete.") (internal quotation marks omitted). But to the extent that a statute's "object and policy" may color its interpretation, *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850), the underlying purpose of § 406(b) confirms the plain reading of its text. In enacting § 406(b), Congress sought to "encourage effective legal representation of claimants" and to limit "inordinately large fees" incurred in their representation before the courts. *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 513

(1965) (*Hearings*) (supplemental report submitted by the Dep't of Health, Educ., & Welfare). Applying § 406(a) and § 406(b) as distinct and independent award mechanisms furthers this first purpose in a manner consistent with the second.

A. A 25-Percent Aggregate Cap Is Inconsistent With Contingent Fee Arrangements And The SSA's Procedure For Distributing Fees

Beneficiaries of Social Security programs are among the nation's most vulnerable and indigent people. See, *e.g.*, Joyce Nicholas, *Prevalence, Characteristics, and Poverty Status of Supplemental Security Income Multirecipients*, 73 Soc. Sec. Bull. No. 3, 2013, at 11 (noting that over 40 percent of SSI beneficiaries live in poverty); Kathleen Romig & Arloc Sherman, *Social Security Keeps 22 Million Americans Out of Poverty: A State-by-State Analysis*, Ctr. on Budget & Pol'y Priorities (last updated Oct. 25, 2016), https://tinyurl.com/ybxqf8bs (concluding that, without Social Security, over 22 million more Americans would live in poverty). Due to severe financial constraints, claimants are reliant upon contingent fee agreements to obtain counsel, which "provide the only practical means by which one * * * can economically afford * * * the services of a competent lawyer." Model Code of Prof'l Responsibility EC 2-20 (Am. Bar Ass'n 1980). Recognizing that "the marketplace for Social Security representation operates largely on a contingency fee basis," this Court has permitted contingent fees, subject to the 25-percent cap under § 406(b). *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 804 (2002) (citations

omitted). But if the 25-percent cap is misconstrued as an aggregate limit on awards issued under both § 406(a) and § 406(b), attorneys will lack the financial incentive to represent the "needy individuals" who qualify for Social Security benefits. See 42 U.S.C. § 306(a).

Consider the following not uncommon scenario. One attorney represents a claimant before the agency, which denies past-due benefits. Soc. Sec. Admin., *FY 2016 Congressional Justification* 143 (2015) (noting that 68 percent of disability claims are initially denied at the agency). Both the claimant and the attorney receive nothing. Another attorney specializing in court work agrees to seek judicial review of the agency's decision and succeeds on appeal. It is largely this attorney's success in the district court that allows the claimant and the earlier attorney to receive anything if the earlier attorney is then successful on remand. As this Court has acknowledged, however, "virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits." *Gisbrecht*, 535 U.S. at 803 (citation omitted). Thus, under the Eleventh Circuit's rule, the earlier attorney can "use up" all of the allowable fees for her payment, possibly foreclosing any payment for the later one.

The possibility of the earlier attorney receiving all the allowable fees will strongly discourage other attorneys from helping claimants seek judicial review. And, realizing that fewer attorneys would agree to seek review of an adverse agency determination, fewer

attorneys will be willing to represent claimants in the initial agency proceedings. Even if the earlier attorney were willing to seek judicial review herself, moreover, she would understand that the many additional hours required for an appeal might entitle her to no additional fees. In a world where contingent fees for civil litigation typically "rang[e] from 33% to 50%" and "seldom amount to less than 33%" of the recovery, Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1347, 1351 (1996), the possibility of receiving fees of less than 25 percent, let alone no fees at all, would strongly discourage attorneys from representing Social Security claimants. The brunt of these disincentives will be borne most severely by the millions of vulnerable individuals that rely on Social Security for their subsistence. See Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2017*, at 2, 4 (2018) (providing that there were 60.9 million OASDI beneficiaries and 8.3 million SSI beneficiaries in 2017).

B. Effective Counsel Is Crucial To Claimant Success Before The Courts And Agency

Claimants filed 19,295 Social Security cases in federal district court in 2017, accounting for 6.61 percent of all civil cases initiated there. Admin. Office of the United States Courts, *Federal Judicial Caseload Statistics 2017*, https://tinyurl.com/y7xrekm9. Pro se litigants face "particular pressures" in civil litigation due to unfamiliarity with the procedural and substantive laws and an inability to effectively gather

and present evidence. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475, 482-483 (2002). The ultimate success of claims may, accordingly, hinge on the availability of competent counsel. *E.g.*, *id.* at 483 n.41 (noting the complexity of the Social Security Act).

In 2017, the district courts remanded 48.65 percent of Social Security cases to the agency, Soc. Sec. Admin., *Court Remands as a Percentage of New Court Cases Filed*, https://tinyurl.com/y9dlnqpe, a figure that has been remarkably steady, U.S. Gov't Accountability Office, GAO-07-331, *Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, but Needs to Manage Data Better on the Increasing Number of Court Remands* 3 (2007) (2007 GAO Report) (between 1995 and 2005, district courts remanded almost 50 percent of Social Security cases to the agency). On remand, moreover, 66 percent of claimants were awarded benefits. 2007 GAO Report 3. Thus, facilitating access to competent counsel for district court proceedings would enable very many claimants each year to obtain the Social Security benefits that they deserve and often desperately require.

Attorney representation before the agency is just as important, if not more so. In 2017, "SSA received over 2.4 million initial and 583,000 reconsideration claims." Office of the Inspector Gen., Soc. Sec. Admin., No. A-02-18-50298, *Fiscal Year 2017 Inspector General's Statement on the Social Security Administration's Major Management and Performance Challenges* 1

(2017), https://tinyurl.com/y8bdzuh2. In an extensive study, the GAO found that parties that were represented by attorneys were 3.3 times more likely to be successful in hearings before ALJs than unrepresented parties were. U.S. Gov't Accountability Office, GAO-04-14, *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level* 51-52 (2003) (analyzing data from 1997-2000).

Should the Eleventh Circuit's interpretation of § 406(b) be endorsed, fewer attorneys will be willing to represent Social Security claimants. Interpreting § 406(b) as a distinct award mechanism is therefore essential to fulfilling Congress's purpose to provide "effective legal representation" to claimants who cannot otherwise afford it. See *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965) (Supplemental report submitted by Dep't of Health, Educ., & Welfare) (*Hearings*).

C. Applying § 406(b) As A Distinct Award Mechanism Will Not Result In Excessive Fees

The plain reading of the text is consistent, moreover, with Congress's second purpose to limit "inordinately large fees" incurred in the representation of Social Security claimants. *Hearings* 513 (Supplemental report submitted by Dep't of Health, Educ., & Welfare). According to the most recent data, the median annual income for attorneys and eligible claimant representatives from direct fee payments was only $20,300. Office of the Inspector

Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* App. C-1 (2015), https://tinyurl.com/y97wvypq. Any concern that attorneys would abuse § 406(b) to charge excessive fees is unfounded and overblown. Attorneys who represent claimants in Social Security proceedings do not do so in order to get rich. Rather, these attorneys accept relatively modest compensation to provide a critical service to our country's most needy and vulnerable individuals.

When a claimant prevails in obtaining disability benefits, whether before the agency or a court, she is entitled to receive monthly benefits "as long as [her] medical condition has not improved and [she] can't work." Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits*, at 1 (2017), https://www.ssa.gov/pubs/EN-05-10153.pdf. As the Ninth Circuit recognized, these "future benefits * * * may far exceed the past-due benefits awarded." *Crawford* v. *Astrue*, 586 F.3d 1142, 1150 (2009). Given the structure of the SSDI program, this makes perfect sense. Past-due benefits compensate a worker for payments to which she was entitled both before and during the legal proceeding. Disability benefits, however, extend far into the future and unlock other sources of support. First, benefits continue for as long as the worker is disabled—so long as they do not reach full retirement age or engage in substantial work. And these benefits increase to keep pace with inflation. See 42 U.S.C. § 415(i)) (providing "cost-of-living increases in benefits").

Second, disability insurance benefits for the individual worker, whether past-due or for the future, are only one part of the total benefits that come from the program. Once a beneficiary has met the requirements for SSDI, benefits are also available for spouses and dependent children. Soc. Sec. Admin., *Benefits Planner: Disability*, https://www.ssa.gov/planners/disability/family.html. Nearly one-fifth of all program beneficiaries are family members of disabled workers. Soc. Sec. Admin., *Annual Statistical Report on the Social Security Disability Insurance Program, 2016*, at 17 tbl. 1 (2017) (*2016 Statistical Report*). After a two-year waiting period, beneficiaries are also eligible for Medicare, which is usually not available to those under 65 years of age. Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits* 7 (2017). This additional benefit is significant. Medicare provides over $10,000 a year in benefits to the average participant. See Henry J. Kaiser Family Found., *Medicare Spending per Enrollee, by State* (2017), https://tinyurl.com/y92da5hb (based on data provided by the Centers for Medicare and Medicaid Servs.) (*Kaiser Medicare Study*). In 2016, for example, half of all disabled workers who became SSDI beneficiaries were under the age of 55, more than a decade from the usual eligibility age. *2016 Statistical Report* 97 tbl. 36. A favorable determination in a disability claim, therefore, often leads to additional years of Medicare enrollment and tens of thousands of dollars in additional benefits.

SSA data demonstrate how substantial future benefits can be. In 2016, the most recent year for

which complete figures are available, the average disability enrollee was 54 years old, *2016 Statistical Report* 58 tbl. 19., and received a monthly benefit of nearly $1,200, *id.* at 18 tbl. 2. If this enrollee had a spouse or one child (as does petitioner's client, Ms. Wood) the average benefit rose to approximately $1,500 per month or almost $18,000 per year. *Ibid.* After ten years, this enrollee would receive about $180,000 in present-value discounted SSDI payments alone.[3] Medicare benefits during this time, after the two-year waiting period, would be nearly $88,000, see *Kaiser Medicare Study*, for a total of nearly $270,000.

As these data show, past-due benefits are a small share of the total benefits an enrollee may receive from a successful claim. If § 406 is read according to its plain meaning, claimants would still receive 100 percent of their future benefits. If our representative enrollee were entitled to four years of past-due benefits when the district court remanded the case to the agency (as Ms. Wood was), the initial award would be nearly $72,000. Pet. App. 11a. Twenty-five percent of that award—$16,000—is roughly 6 percent of the $270,000 the enrollee would expect to eventually receive as a result of the lawyer's in-court representation. That is hardly an excessive fee.

Given how much is at stake, an attorney's fee of—at most—a quarter of past-due benefits is in the best interest of the disabled worker. The correct reading of

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[3] Since social security disabililty benefits increase with inflation, see 42 U.S.C. § 415(i) (providing "cost-of-living increases in benefits"), proper present-value discounting and inflation-adjusting roughly cancel each other out in the example.

§ 406 ensures that attorneys representing disabled workers receive a reasonable fee—and no more—for their work.

IV. The Legislative History Evinces Congress's Intent That Section 406(b)'s 25-Percent Cap Apply Only To Fees Awarded For In-Court Representation

Those courts aggregating agency and court fee awards under § 406(b) have relied almost exclusively on legislative history to reach this result. That is mistaken. Not only is such reliance suspect, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."), but the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *ibid.*; see also *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.") (citations and internal quotation marks omitted). Properly considered, however, the legislative history actually supports the proposition that Congress intended for § 406(b)'s 25-percent cap to apply only to fees awarded for in-court representation.

Those courts holding that § 406(a) and § 406(b) fees must be aggregated under the 25-percent cap base their analysis on two pieces of legislative history: Hearings before the Senate Committee on Finance and a Senate Report. See *Morris* v. *Social Sec. Admin.*, 689 F.2d 495, 497 (4th Cir. 1982) (discussing the Senate Report); *Dawson* v. *Finch*, 425 F.2d 1192, 1194-1195 &

nn.2-3 (5th Cir. 1970) (discussing both documents); Pet. App. 11a-14a (adopting the Fifth Circuit's legislative history analysis in *Dawson*). Contrary to these courts' reading of them, both of these pieces of legislative history support the opposite conclusion—that Congress intended § 406(b)'s cap to apply only to fees for in-court proceedings.

The relevant part of the Senate Finance Committee hearings rests completely on a report submitted by the Department of Health, Education, and Welfare (HEW). *Hearings* 512-13 (supplemental report submitted by the Dep't of Health, Educ., & Welfare). While HEW's explanation does evince concern about "inordinately large fees," it goes on to clarify exactly what type of fees Congress had in mind. *Id.* at 513. As HEW explained:

> [A]ttorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in *Federal district court actions* arising under the social security program. Usually these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Ibid. (emphasis added). Simply put, the fees that Congress was concerned about when it enacted § 406(b)'s cap were those for in-court representation. The legislative history does not support the idea that

the 25-percent cap in § 406(b) was to apply to the aggregate fees earned under § 406(a) and § 406(b). That makes sense because fees for representation before the agency often go to a different person and are already subject to reasonableness review by the agency or a separate 25-percent cap. See pp. 13-17, *supra* (describing statutory scheme). They could not lead to "inordinately large fees" for representation in court.

A proper reading of the Senate report further bolsters the conclusion that Congress intended § 406(b)'s cap to apply only to fees for court representation. The Senate Report adopted HEW's explanation nearly verbatim. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, at 122 (1965) (S. Report) ("It has come to the attention of the committee that attorneys have upon occasion, charged what appear to be inordinately large fees for representing claimants in Federal district court."). And the report's section-by-section analysis of the bill reiterates that § 406(b) allows a court to award fees "not in excess of 25 percent of the total of the past due benefits which become payable as a result of the court's decision—for the attorney who represented the claimant *before the court*." S. Report 258 (emphasis added). The final House-Senate Conference Report on this legislation also adopted nearly identical language. H.R. Rep. No. 682, 89th Cong., 1st Sess., 62-63 (1965). At bottom, the legislative history supports the proposition that § 406(b)'s 25-percent cap applies only to in-court legal fees, not to the total fees before both the agency and the court.

This Court confirmed this view of § 406's legislative history in *Gisbrecht* v. *Barnhart*, 535 U.S. 789 (2002). From the outset of the decision, this Court discussed § 406(b) as "concern[ing] the fees that may be awarded attorneys who successfully represent Social Security benefits claimants *in court*." *Id.* at 792 (emphasis added). In reviewing the legislative history of § 406(b), this Court found that "Congress provided for 'a reasonable fee, not in excess of 25 percent of accrued benefits,' as part of the court's judgment, and further specified that 'no other fee would be payable'" for in-court representation. *Id.* at 804-805 (quoting S. Report 122). This limitation on in-court fees made sense, the Court noted, because "Congress was mindful * * * that the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed." 535 U.S. at 804. This Court specifically recognized that § 406(b) was Congress's attempt to "[a]ttend[] to the[] realities" of the potential length of benefit-determination litigation. *Ibid.* Since Congress intended for fees for "the administrative and judicial review stages" to be dealt with "discretely," *id.* at 794, it was perfectly sensible for it to subject each to different requirements. Putting a 25-percent cap on attorney's fees for representation in court was Congress's chosen approach. Given the problem Congress perceived at the time it enacted § 406(b), it did not see fit to include within that cap fees awarded under § 406(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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